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Constitutional Law - Post-Search Disclaimer Standing Alone, Does Not Constitute Abandonment

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CONSTITUTIONAL LAW: SEARCH AND SEIZURE—POST-SEARCH DISCLAIMER OF OWNERSHIP, STANDING ALONE, DOES NOT CONSTITUTE ABANDONMENT

In September of 1988, David Huether was stopped by highway patrol officer Rick Michels for speeding.[1] Officer Michels, suspicious that there might be an open alcohol container, asked Huether whether he could search his pick-up truck, and Huether consented.[2] During the search, Michels saw a brown paper bag partly under the seat.[3] As Michels pulled the bag from under the seat, Huether told him it contained only garbage.[4] Michels then opened the bag and discovered packets of what he believed to be a controlled substance.[5] Huether denied both owning the bag and knowledge of its contents.[6] He was arrested and charged with possession with intent to deliver a controlled substance.[7] The trial

1. State v. Huether, 453 N.W.2d 778, 780 (N.D. 1990). *See also* Suppression Hearing Transcript at 9, State v. Huether, 453 N.W.2d 778 (N.D. 1990) (No.890261) [hereinafter Suppression Hearings Transcript] (available at the Thormodsgard Law Library, University of North Dakota). Michels testified that on September 24, 1988, at approximately 5:45 p.m., "[t]he defendant was clocked at 66 miles an hour," traveling east on Highway 21 approximately two to three miles east of New Leipzig, North Dakota. *Id.* at 8-9.

2. *See* Suppression Hearings Transcript *supra* note 1, at 12-13. The suppression hearings took place nine and one-third months after the arrest. *Id.* at 1. At the time of the arrest, Officer Michels was a seven year veteran with the North Dakota State Patrol. *Id.* at 3. Officer Michels testified that he had received an Associate Degree in law enforcement from the University of Corrections State School of Science and, in addition, had completed two years of training at the academy in Alexandria, Minnesota. *Id.* Officer Michels also testified that his training with the Highway Patrol and the academy included what alcoholic beverages smell like, how they are packaged, and the appearance and demeanor of a person drinking alcohol. *Id.* at 6. Officer Michels testified that when the stop took place, Huether immediately exited his car and came back to the squad car. *Id.* at 9. Officer Michels also testified that if a subject of a police stop exits the vehicle rapidly, it may be to prevent the officer from approaching and detecting alcohol in the vehicle. *Id.* at 7. Officer Michels testified that after Huether came back to the squad car, he detected the odor of alcohol on Huether. *Id.* at 12. During questioning of Huether about whether he had been drinking, Huether admitted that he had a "couple beers" at "Oktoberfest" in New Leipzig. *Id.* Officer Michels testified that Huether volunteered that the officer could search the pick-up and also volunteered that he had an unopened six-pack inside his vehicle. *Id.* at 12-13.

3. *Id.* at 22. Officer Michels testified that when he opened the driver's door, he saw the six-pack on the passenger floor and a small sack on the floor, sticking partly out from under the middle of the seat. *Id.* Huether testified that because his pick-up was equipped with an automatic transmission and bench seat, there was approximately one and one-half inches between the floor and the seat. *Id.* at 46-47.

4. Suppression Hearings Transcript, *supra* note 1, at 23. Officer Michels testified that Huether immediately stated, before he opened the bag, that it contained only garbage. *Id.*

5. *Id.* at 24-25. Officer Michels testified that he knew, by the weight of the paper bag, that it did not contain any full alcoholic beverage containers. *Id.* at 24. He did not consider, before opening the bag, whether, by its weight and appearance, it could contain any empty containers, but he immediately thought that it may have contained a can with some fluid inside. *Id.* at 24-25.

6. *Id.* at 26. Officer Michels testified that after he pulled two individual packets containing a controlled substance out of the bag, Huether immediately asked what the substance was. *Id.*

7. State v. Huether, 453 N.W.2d 778, 780 (N.D. 1990). *See* N.D. CENT. CODE § 19-03.1-

court granted Huether's motion to suppress evidence found in the bag.[8] The State appealed, asserting that because Huether denied ownership of the bag, he lacked standing to contest its search.[9] The State also contended that the search of the bag was within Huether's consent and was valid because the officer had probable cause to believe it contained an open, alcoholic beverage container.[10] The North Dakota Supreme Court, affirming the district court decision, *held* that (1) Huether did not abandon the paper bag containing the controlled substance, (2) the officer exceeded the scope of consent when he opened the partially concealed paper bag, and (3) the officer did not have probable cause to believe the paper bag concealed an alcoholic beverage container.[11] *State v. Huether*, 453 N.W.2d 778 (N.D. 1990).

A motion to suppress evidence obtained in a search allegedly conducted in violation of the fourth amendment[12] often raises the issue of whether the moving party may properly challenge the constitutionality of the search.[13] The issue is usually framed in terms of whether the party has standing to seek relief.[14] Requiring a party seeking relief to have a personal stake in the outcome assures a truly adversarial posture which, in turn, draws the court's focus to the legal questions and constitutional issues involved.[15] The standing rule also prohibits vicarious fourth amendment alle-

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23(1)(b) (classifying possession of a controlled substance with intent to deliver as a class B felony).

8. Memorandum Opinion of Appendix at 5, State v. Huether, 453 N.W.2d 778 (N.D. 1990) (No. 890261) [hereinafter Memorandum Opinion] (available at Thormodsgard Law Library, University of North Dakota).

9. *Huether*, 453 N.W.2d at 780.

10. *Id.* at 782.

11. *Id.* at 781, 783.

12. The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

13. 4 W. LAFAVE, SEARCH & SEIZURE § 11.3 at 279 (2d ed. 1987) (the exclusionary rule, which commands that material acquired during an unconstitutional search is not admissible as evidence, may only be exercised by a party with a justifiable claim).

14. *Id.* *See* Sierra Club v. Morton, 405 U.S. 727, 737 (1972) (standing to sue requires that a party have a sufficient stake in the outcome of a justifiable controversy that can be redressed by judicial resolution). *But cf.* Rakas v. Illinois, 439 U.S. 128, 139 (1978) (to assure that personal rights are, through exclusion of evidence, only enforced by those deprived of fourth amendment protection, the proper analysis considers the extent of those rights, rather than invocation of an external, yet intertwined, doctrine of standing).

15. Baker v. Carr, 369 U.S. 186, 204-08 (1962) (claimants in class action to enjoin the execution of further elections under Apportionment Act were found to suffer gross disproportion of representation sufficient for standing when the injury asserted by the claimants was that the Act placed them in a position of unjustifiable inequality compared to voters residing in counties favored by the Act).

gations: only those whose rights were allegedly violated have a basis to invoke those rights.[16] It is not enough that a party moving to suppress evidence is prejudiced by a seizure directed at someone else; the movant himself must be the victim of the search.[17]

In determining who is properly considered the victim of a search, courts have, at times, relied on property principles to base standing on a proprietary interest in the place searched[18] or a possessory interest in the material seized.[19] However, an expansive number of exceptions developed as courts relying upon property principles sought to protect private places through intensively fact-oriented inquiries.[20]

Adherence to the property basis for fourth amendment analysis also posed problems for law enforcement officials by requiring that items seized be more than simply an indication of crime.[21] Unless proven to be contraband, an instrumentality, or the fruit of crime, a party's property interest in an item seized was often deemed superior to the public's interest in "mere evidence."[22]

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16. Rakas v. Illinois, 439 U.S. 128, 134 (1978). *Compare* Jones v. United States, 362 U.S. 257, 260-67 (1960) (the defendant, accused of a possessory offense, legally present but not residing in apartment which was searched, was deemed to have "automatic standing" to question the legality of the search because the same possession needed to establish standing was an essential element of the offense charged) *with* United States v. Salvucci, 448 U.S. 83, 87-89 (1980) (expressly overruling *Jones* by eliminating the "automatic standing" rule, explaining that the issue of whether one may challenge the legality of a search is simply a question of whether one's rights were violated by the search).

17. Brown v. United States, 411 U.S. 223, 227-30 (1973) (claimants who had no legitimate expectation of privacy or interest lacked standing).

18. Mickenberg, *Fourth Amendment Standing After Rakas v. Illinois: From Property to Privacy and Back*, 16 NEW ENG. L. REV. 197, 204 (1981) [hereinafter Mickenberg] (describing standing based either on a property right in the area searched (such as a homeowner's right to challenge a search of that home) or a possessory interest in the area searched (such as an apartment dweller's right to challenge a search of his or her home)). *But cf.* Jones v. United States 362 United States 257, 267 (1960) (holding that standing could be established merely when one was lawfully on the premises searched).

19. United States v. Jeffers, 342 U.S. 48, 52-54 (1951) (defendant who stored narcotics in hotel room he did not occupy, and without the occupant's knowledge, nonetheless had standing).

20. *Mickenberg*, *supra* note 18, at 203 (piecemeal approach to fourth amendment analysis forced the United States Supreme Court to accommodate the inadequacies of undue reliance on property notions by extending fourth amendment protection to purely nonproprietary situations). *See* Rios v. United States, 364 U.S. 253 (1960) (passenger of rented taxicab is protected by fourth amendment). *See also* Chapman v. United States, 365 U.S. 610 (1961) (rented apartment is considered a private place and is therefore protected from unreasonable search and seizure).

21. Gouled v. United States, 255 U.S. 298, 306-09 (1921). The government attempted to use seized contracts against the defendant to show his participation in a conspiracy to defraud the government. *Id.* The warrant was deemed unavailable for use as a tool to gain access to defendant's house solely to search for evidence to be used against him. *Id.* at 309. Thus, the "mere evidence" rule conferred on the government the right to search and seize property only when the government was entitled to claim an interest superior to that of the owner or possessor of the property, such as in confiscating stolen property. *Mickenberg*, *supra* note 18, at 204.

22. *Id.* *Contra* Warden v. Hayden, 387 U.S. 294, 300-02 (1967) (reversing *Gouled*

However, the United States Supreme Court departed from this proprietary view in *United States v. Katz*[23] by announcing that the fourth amendment protects people, not places.[24] The point at which a person can claim reasonable expectation of freedom from governmental intrusion became the standard for determining when a person's fourth amendment rights were implicated.[25] Yet, inquiries from such a fundamental starting point continued to revolve around whether the person had a property interest in the place searched or in the items seized.[26]

As fourth amendment analysis evolved from proprietary to privacy notions, court analysis in vehicle searches began to center on whether a search infringed upon the subject's expectation of freedom from governmental intrusion.[27] But courts also recognized a lesser degree of privacy in vehicles, due to their mobility[28] and their exposure to public view.[29] In *Rakas v. Illinois*,[30] the United States Supreme Court discarded a patchwork of precedent and turned to what is viewed as the more restrictive "legitimate expectation of privacy" standard.[31] In *Rakas*, police officers

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because "mere evidence" rule did not advance principal objective of fourth amendment of protecting privacy).

23. 389 U.S. 347 (1967).

24. United States v. Katz, 389 U.S. 347, 353 (1967) (agent's attachment of wiretap recorder on phone booth held impermissible because intrusion went to area from which defendant sought to exclude others).

25. Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (fourth amendment protection hinges on whether there was "a reasonable expectation of freedom from governmental intrusion"). *But cf.* Rawlings v. Kentucky, 448 U.S. 98, 104-05 (1980) (placing property in companion's purse diluted defendant's legitimate expectation of privacy, because defendant could no longer control access of others to articles in purse).

26. Mickenburg, *supra* note 18, at 209 (*Katz* had no significant impact on development of fourth amendment law). *See also* Note, *The Relationship Between Trespass and Fourth Amendment Protection After Katz v. United States*, 38 OHIO ST. L.J. 709, 710 (1977). The *Katz* reasonable expectation of privacy test fails to protect in situations in which a person's right to be secure in his or her own home is violated, but his or her right to privacy has not been violated. *Id.* The reasonable expectation of privacy doctrine merely supplements fourth amendment analysis based on the trespass doctrine, which triggers fourth amendment protection upon an officer's unauthorized entry upon property of another. *Id.*

27. *Katz*, 389 U.S. at 351-52 (that which a person intends to keep private, "even in an area accessible to the public, may be constitutionally protected").

28. Carroll v. United States, 267 U.S. 132, 153 (1925) (warrantless vehicle search and seizure of illegal alcohol hidden within rear seat upholstery deemed reasonable for the purpose of conserving public interest due to transient means employed in executing illegal activity). *See also* Chambers v. Maroney, 399 U.S. 42, 48-51 (1970) (delayed search of automobile used in armed bank robbery was upheld, because unforeseeable circumstances most often provide probable cause, while opportunity to search movable automobile is fleeting).

29. Colorado v. Bannister, 449 U.S. 1, 4 (1980) (officer sighting stolen vehicle parts lying within plain view inside vehicle did not violate fourth amendment in seizing, without a warrant, the instruments of crime); Rakas v. Illinois, 439 U.S 128, 148-49 (1978) (there exists a significantly different expectation of privacy in vehicles than in the privacy and freedom traditionally associated with one's residence).

30. 439 U.S. 128, 148 (1978).

31. *Rakas*, 439 U.S. at 143-44 n.12 (overruling Jones v. United States, 362 U.S. 257

stopped a suspected getaway car in which the defendants were passengers.[32] The defendants were arrested after officers found a shotgun under the seat and shotgun shells in the glovebox.[33] The defendants challenged the admission of the gun and shells into evidence, but the trial court ruled that they lacked standing to challenge the search because they did not own the gun, shells, or car.[34] On appeal, the United States Supreme Court held that passengers do not, by mere status as passengers, have standing with regard to the interior of the vehicle.[35] The Court also discarded the theoretically separate concept of standing in determining whether a defendant is entitled to exclude material obtained by an unreasonable search.[36]

Subsequently, in *United States v. Salvucci*,[37] the Court replaced the automatic standing doctrine with the "legitimate expectation of privacy" standard.[38] In applying this standard, courts have held that placing property in control of another relinquishes one's prior legitimate expectation of privacy.[39] Likewise,

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(1960)). "Legitimate" expectation of privacy must be one which society recognizes as reasonable, and requires more than a "subjective expectation of not being discovered." *Id.* An expectation of privacy need not be based on common-law property interests; however, the Court continues to use such concepts in determining whether a privacy interest exists. *Id. Rakas'* emphasis on property law in search and seizure questions, while not requiring a privacy interest to be based on common-law property concepts, does allow a court to rely exclusively on these concepts when there are no other means of avoiding suppression of evidence.

32. *Rakas*, 439 U.S. at 130. An officer on routine patrol after receiving a description of a getaway car used in a store robbery spotted a vehicle fitting the description. *Id.* The officer followed the vehicle for some time and then stopped the vehicle after assistance arrived. *Id.*

33. *Id.* "Officers discovered a box of shotgun shells in the glove compartment, which had been locked, and a sawed-off shotgun under the front passenger seat." *Id.* Thereafter, the officers took the defendants to the police station and arrested them. *Id.*

34. *Id.* at 129-30. The defendants claimed they were never asked if they owned the shotgun or shells. *Id.* at 130 n.1. They argued on appeal that if the court were to determine that a property interest in the seized items were adequate grounds for standing, then the court should have remanded the case to determine whether defendants did own the seized shotgun or shells. *Id.*

35. *Rakas*, 439 U.S. at 148-50. The majority held that the petitioners, who asserted neither a property nor a possessory interest in the automobile searched nor an interest in the property seized, and who failed to show that they had any legitimate expectation of privacy in the glove compartment or the area under the seat upon which they were mere passengers, were not entitled to challenge a search of those areas. *Id.*

36. *Id.* at 139-40. The Court enunciated an approach that "forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Id.* at 139.

37. 448 U.S. 83 (1980).

38. United States v. Salvucci, 448 U.S. 83, 95 (1980). The determination is not dependent on standing, but whether one's rights were violated by the search or seizure. *Id.* at 87 n.4.

39. Rawlings v. Kentucky, 448 U.S. 98, 104-06 (1980) (defendant lacked standing to object to search of companion's purse containing defendant's contraband, because defendant did not have right to exclude others from access to purse). *See also* United States v. Koessel, 706 F.2d 271, 274 (8th Cir. 1983) (defendant, remaining in immediate area, lost privacy in drug sample by giving it to middleman for prospective buyer to try).

an owner loses his legitimate expectation of privacy in a container when he abandons it.[40] However, courts have recognized the distinction between abandonment and a denial of ownership made in order to avoid incriminating oneself, which has been held insufficient to extinguish one's legitimate expectation of privacy in a disclaimed container.[41] But courts have also recognized such disclaimers as a basis for defeating standing for fourth amendment purposes.[42]

In *State v. Benjamin*,[43] the North Dakota Supreme Court considered whether the defendant had standing for a fourth amendment challenge when a warranted search of his trailer home, in which he was neither present nor resided, resulted in the seizure of four grams of marijuana. The court rejected the "automatic standing rule," which guaranteed that a person charged with a possessory crime could challenge the legality of a search.[44] In addition to adopting the legitimate expectation of privacy standard, the North Dakota Supreme Court also relied on *Rakas* in rejecting the "target theory," which automatically imputed standing to a person against whom a search was directed.[45]

The North Dakota Supreme Court again examined the issue of fourth amendment standing in *State v. Huether*.[46] Huether based his assertion of standing on vehicle ownership and a statutorily created possessory interest in the narcotics that were discovered

40. United States v. Anderson, 500 F.2d 1311, 1318 (5th Cir. 1974) (defendants' refusal to claim luggage checked at airport meant a loss in their legitimate expectation of privacy; therefore, they lacked standing with which to contest the warrantless search). *See also* State v. Kerr, 143 Vt. 597, __, 470 A.2d 670, 676 (1983) (defendant's denial of any interest in bag containing narcotics dislodged his standing to contest search of the bag).

41. State v. Isom, 196 Mont. 330, __, 641 P.2d 417, 422 (1982) (refusing to incriminate oneself in response to police interrogations cannot eliminate fourth amendment rights). *Accord* United States v. Morales, 737 F.2d 761, 763 (8th Cir. 1984) (government may not argue at suppression hearing that defendant did not own evidence and thus lacked standing, while subsequently arguing to the jury that the evidence belonged to defendant). *See also* State v. Cooke, 306 N.C. 132, __, 291 S.E.2d 618, 620 (1982) (suspect's disclaimer did not destroy his legitimate expectation of privacy in contents of suitcase which bore his identification tag).

42. Miller v. State, 520 S.W.2d 729, 733-35 (Tenn. 1975) (denial of ownership precluded defendant's standing to object to search of vehicle). *See also* State v. Brown, 412 So. 2d 24, 24-25 (Fla. 1982) (upon denying prior possession to police, defendant lost expectation of privacy in luggage checked at airport).

43. 417 N.W.2d 838 (N.D. 1988).

44. State v. Benjamin, 417 N.W.2d 838, 839-40 (N.D. 1988). *See generally* United States v. Salvucci, 448 U.S. 83 (1980) (overruling Jones v. United States, 362 U.S. 257, 263 (1960) (possession, if the basis upon which one is charged, suffices to establish standing)).

45. *Benjamin*, 417 N.W.2d at 840 (declining to return to the theory that conferred standing automatically upon a person merely on the basis that the person was the target of the search). *See generally* Alderman v. United States, 394 U.S. 165 (1969) (adherence to the general rule that fourth amendment rights cannot be vicariously asserted prevents one individual from asserting an independent constitutional right in order to exclude evidence seized from another).

46. 453 N.W.2d 778, 780-81 (N.D. 1990).

during the search.[47] The State contended that Huether's consent acted as a waiver of any expectation of privacy he had in the vehicle and, alternatively, that his denial of ownership of the bag left him with no legitimate expectation of privacy in the bag.[48] While acknowledging that abandonment implies a renunciation of any reasonable expectation of privacy,[49] the court recognized the question of abandonment as a factual inquiry[50] and invoked the clearly erroneous standard of review.[51] The court noted that the district court had determined that Huether's disavowal of ownership of the paper bag, standing alone, was not a renunciation of his reasonable expectation of privacy in the bag.[52] The court referred to Huether's disclaimer as " 'not necessarily the hallmark for deciding the substance of a fourth amendment claim.' "[53]

In framing its inquiry along legitimate expectation of privacy lines, the court reasoned that because ownership alone did not necessarily establish a reasonable expectation of privacy, neither could disavowal of ownership, standing alone, necessarily dislodge one's reasonable expectation of privacy.[54] This was especially true because the bag in question was contained and controlled within Huether's vehicle, an area in which the court recognized a legitimate expectation of privacy for every container concealing its contents.[55]

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47. Appellee's Brief at 7, State v. Huether, 453 N.W.2d 778 (N.D. 1990) (No. 890261) (available at Thormodsgard Law Library, University of North Dakota).

48. Appellant's Brief at 29, State v. Huether, 453 N.W.2d 778 (N.D. 1990) (No. 890261) [hereinafter Appellant's Brief]. Appellant sought support from United States v. Veatch, 674 F.2d 1217 (8th Cir. 1981), asserting that Huether had relinquished his interest in the bag by his actions. Appellant's Brief at 35-36. In *Veatch*, the defendant was deemed to have an insufficient privacy interest in a billfold found in the backseat of an automobile where he had been seated. *Veatch*, 674 F.2d at 1220-21. In response to an officer's inquiry as to whether he wanted to take the wallet with him when ordered out of the car, the defendant denied ownership of the wallet. *Id.* at 1219.

49. *Huether*, 453 N.W.2d at 781. *See also* United States v. Alden, 576 F.2d 772, 777 (8th Cir. 1978), *cert. denied*, 439 U.S. 855 (1978) (items seized from a trash pile, despite its location adjacent to the defendant's residence, were deemed to be abandoned and thus could not harbor a reasonable expectation of privacy interest).

50. *Huether*, 453 N.W.2d at 780. *See also* United States v. Thomas, 864 F.2d 843, 846 (D.C. Cir. 1989) (ultimate determination of whether defendant abandoned gym bag in public hallway by walking away from it hinged on a factual inquiry into the intent of the defendant).

51. *Huether*, 453 N.W.2d at 781.

52. *Id.* The court based its decision on fifth amendment protection from self-incrimination and deference to the trial court. *Id.* at 782.

53. *Id.* (quoting United States v. Hawkins, 681 F.2d 1343, 1346 (11th Cir. 1982), *cert. denied*, 459 U.S. 994 (1982)).

54. *Id. Accord* Commonwealth v. Holloway, 9 Va. App. 11, 14, 384 S.E.2d 99, 104 (1989) (passenger's failure to respond to officer's inquiry about ownership of luggage did not constitute passenger's intent to relinquish and thus did not dispel his expectation of privacy in the luggage).

55. *Huether*, 453 N.W.2d at 781. The court distinguished the placement of a container confined within a vehicle and a container accessible to the public at large, noting that,

The court also considered the time at which the denial of ownership was volunteered, recognizing that after a vehicle search uncovers contraband, there exists a tension between one's privacy interests and one's interest in avoiding self-incrimination.[56] The court reasoned that requiring one to acknowledge a possessory interest in such contraband for the purpose of maintaining a privacy interest forces one to sacrifice his or her fifth amendment rights in order to preserve his or her fourth amendment rights.[57] Refusing to condone such constitutional conflict, the court determined that a post-search disclaimer offered in effort to assuage self-accusation could not, in and of itself, constitute abandonment.[58]

However, the court was unwilling to extend this protection to passengers of a vehicle.[59] It referred to *United States v. Veatch*,[60] in which the defendant, by disclaiming ownership of a wallet lying next to where he had been sitting on the back seat, lost his fourth amendment protection in the wallet.[61] For the North Dakota Supreme Court, the defendant's passenger status distinguished the case.[62] The Huether court's apparent reliance upon passenger sta-

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"Huether did not discard or place the bag in a private place [and there was] little doubt that [he] had an expectation of privacy in his vehicle and every container therein that concealed its contents from plain view." *Id.*

56. *Id. See generally* U.S. CONST. amend. V (providing, in relevant part, "No person shall . . . be compelled in any criminal case to be a witness against himself").

57. *Huether*, 453 N.W.2d at 781. *See supra* note 41 and accompanying text.

58. *Huether*, 453 N.W.2d at 781. *See* State v. Machlah, 505 N.E.2d 873, 879 (Ind. Ct. App. 1987) ("reasonable expectation of privacy means an expectation at the time of the search, not after [the] police have completed the search").

59. *Huether*, 453 N.W.2d at 781 n.2. *See* Rakas v. Illinois, 439 U.S. 128 (1978) (vehicle passenger who was not the owner of the car had no legitimate expectation of privacy in property placed in the glove compartment and under passenger seat of a car). *But see* United States v. Ochs, 595 F.2d 1247, 1253 n.4 (2d Cir. 1979) (court rejected the idea that ownership is determinative and found that defendant, who had borrowed car, had standing to challenge search).

60. 674 F.2d 1217 (9th Cir. 1981).

61. United States v. Veatch, 674 F.2d 1217 (9th Cir. 1981). Veatch was a passenger in a vehicle. *Id.* at 1219. The vehicle was stopped, and the officer, noting a wallet in plain view in the back seat where Veatch had been sitting, asked Veatch if the wallet was his and if he wanted to take it with him. *Id.* Veatch denied ownership of the wallet. *Id.* The court of appeals affirmed the trial court's finding that Veatch abandoned the wallet and any reasonable expectation of privacy in it. *Id.* at 1222.

62. *Huether*, 453 N.W.2d at 781 n.2. Veatch was one of three occupants in a vehicle he had purchased with a fraudulent check. *Veatch*, 674 F.2d at 1219. In response to FBI information that the car was fraudulently purchased, highway patrol officers stopped the vehicle. *Id.* After the occupants peacefully stepped out of the vehicle, an officer noticed a handgun and a wallet slightly wedged between the bottom and the backrest portions of the seat where Veatch had been seated. *Id.* Search of the wallet, upheld on appeal, revealed evidence admitted to incriminate Veatch. *Id.* at 1219-22. *But cf.* 4 W. LAFAVE, SEARCH & SEIZURE § 11.3(f) at 342 (2d ed. 1987) (explaining that the question is not whether the defendant has shielded his effects from scrutiny against the entire world, but whether the area was one in which he placed a "reasonable expectation of freedom from *governmental* intrusion" (quoting Mancusi v. DeForte, 392 U.S. 364, 368 (1967) and adding emphasis).

tus appears to conflict with both the majority and dissenting opinions in *Rakas*, which cautioned that passenger status in a vehicle should not automatically extinguish one's expectation of privacy.[63] While legitimate presence does not control the validity of a police search, it is, nonetheless, relevant to one's expectation of privacy.[64]

The State also alleged that the search of the bag was within the scope of Huether's consent.[65] The consent search, as an exception to the warrant and probable cause requirements of the fourth amendment,[66] is often viewed by law enforcement as a preferable means by which to execute a search.[67] In addition to administrative convenience, it may minimize the risk of suppression.[68] To the extent that the consenting party fails to qualify or carefully condition his or her consent, the scope of search is broadened.[69] Therefore, limitations, both express and implied, establish the permissible scope of consent.[70]

Consent to a request by police to search for a particular item known to exist in a particular place authorizes the police to proceed only to that place, without searching elsewhere.[71] When a suspect's consent indicates he or she believes an officer has access only to a certain area, the consent covers only that area.[72] But

63. *Rakas*, 439 U.S. at 149 n.17 (instant decision did not signal an absolute denial of privacy interest for vehicle passengers). Justice White's dissent was critical of a holding that would deny search of a vehicle merely on a basis of lack of possessory interest in the vehicle. *Id.* at 161.

64. *Id.* at 147-48.

65. *Huether*, 453 N.W.2d at 782.

66. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Whether consent to search was voluntarily given was to be determined by the totality of the circumstances. *Id.* at 248-49. The Court also determined that it was unnecessary for the state to show that the consenting party knew they could refuse consent, and that such knowledge, while applicable to the waiver of some constitutional rights relating to a fair trial, was not applicable to the fourth amendment guaranty against unreasonable search and seizure. *Id.* at 235-46.

67. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME, at 159 (1967) (law enforcement prefer the administrative convenience of consent searches).

68. May v. State, 618 S.W.2d 333, 345 (Tex. Crim. 1981) (defendant's wife gave written consent to a complete search of defendant's house, and such search was not invalid on the theory that it allowed a general exploratory search).

69. *Id.* (consent authorized officers to conduct a complete search and seize any property they desired).

70. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 240.3(1) (1975) (providing that a consent search "shall not exceed, in duration or physical scope, the limits of the consent given. . . .").

71. People v. Schmoll, 383 Ill. 280, 287, 48 N.E.2d 933, 934 (1943) (physician's consent for police to search one patient's file did not allow police to seize all files). *But see* People v. Torand, 633 P.2d 1061, 1062 (Colo. 1981) (police are not expected to close their eyes to a plainly visible article merely because its incriminating character is not presently apparent to them).

72. United States v. Patacchia, 602 F.2d 218, 219 (9th Cir. 1979), *opinion amended*, 610 F.2d 648 (when defendant was willing to open car trunk for police inspection but also expressed inability to do so because of failure of locking mechanism, police action of prying trunk open went beyond consent). *But see* State v. Lash, 21 N.C. App. 365, 366, 204 S.E.2d

where no limitation is placed on the specific areas of a vehicle which are to be searched, and the consenting party does not object during execution of the search, increasingly intrusive police activity may be viewed as lying within the scope of consent.[73]

When police indicate their purpose in requesting a search, it is commonly considered a limitation on the scope, allowing no more intrusion than necessary to meet their objective.[74] However, police may, during execution of a consent search, seize evidence found in plain view[75] if the item seized indicates a crime.[76]

In *Huether*, the court, in considering the scope of consent in a warrantless search, first recognized the consent search as an exception to both the warrant and probable cause requirements of the fourth amendment.[77] The court then adopted the prevalent view that an officer's search pursuant to consent is limited by the consent given, and must be conducted accordingly.[78]

563, 565 (1974) (suspect's explanation that she did not have the trunk key, offered with her consent to search of car interior, held insufficient to limit officers from entering trunk through back seat).

73. United States v. Espinosa, 782 F.2d 888, 891-92 (10th Cir. 1986) (defendant gave permission by standing aside and expressing no concern when officer removed back seat and back quarter panel). *Accord* United States v. Sierra-Hernandez, 581 F.2d 760, 764 (9th Cir. 1978), *cert. denied*, 439 U.S. 936 (1978) (when police, after receiving permission to look inside truck, extended search to engine compartment, driver's failure to object to continuation of the search indicated search was within scope of initial consent).

74. People v. Torand, 622 P.2d 562, 565 (Colo. 1981). *See also* United States v. Dichiarinte, 445 F.2d 126, 129-30 (7th Cir. 1971) (pursuant to consent search for narcotics, police opening of incriminating documents deemed beyond scope of consent). *But cf.* United States v. White, 706 F.2d 806, 808 (7th Cir. 1983) (stated intent to search for narcotics allowed search of flight bag as a place narcotics could reasonably be expected to be concealed). *See* Gentile v. United States, 419 U.S. 979, 980 (1975) (Douglas, J., dissenting) (Justice Douglas dissented from the denial of certiorari, arguing that, if valid, the consent form was too narrow to allow seizure of evidence of unrelated crime). *Cf.* United States v. Ross, 456 U.S. 798, 808-09 (1982) (permissible extent of a warrantless search based on probable cause is no greater or less than where a search is based on a warrant obtained by probable cause).

75. *Dichiarinte*, 445 F.2d at 130 (noting that agents may seize indications of crime or evidence of criminal behavior lying in plain view).

76. Warden v. Hayden, 387 U.S. 294, 307 (1967) (establishing test under which item not indicated as object of search may be seized, requiring nexus between item seized and criminal behavior).

77. State v. Huether, 453 N.W.2d 778, 782 (N.D. 1990) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)) (the court, while upholding the search because driver actually assisted officer's discovery of stolen checks, characterized as well settled law the idea that consent search is a specifically established exception to warrant and probable cause requirements). *See* United States v. Mines, 883 F.2d 801, 803 (9th Cir. 1989), *cert. denied*, 493 U.S. 997 (1989) (whether search exceeds scope is a factual question). *See also* N.D.R. CIV. P. 52(a) (providing, in relevant part that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses").

78. *Huether*, 453 N.W.2d at 782. *See* United States v. McBean, 861 F.2d. 1570, 1573 n.6 (11th Cir. 1988) (" 'A defendant's consent may limit the extent or scope of a warrantless search in the same way that the specifications of a warrant limit a search pursuant to that warrant.' " (quoting *Dichiarinte*, 445 F.2d at 129-30 n.3)). *See also*, Florida v. Jimeno, 111 S. Ct. 1801 (1991). A consent to search car for narcotics included within its scope the consent

The Huether court aligned with the trial court in determining that the purpose of the search limited its scope.[79] The court found support in Officer Michels' testimony for the trial court's finding that Michels was limited by Huether's consent to search for open containers.[80] The court reasoned that, given its appearance and location, the bag could not reasonably have been expected to conceal an alcoholic beverage container.[81] The court held that the officer exceeded the scope of consent when he opened the partially concealed paper bag.[82] The determining factor was that the bag had neither the weight nor the shape of an alcoholic beverage container.[83]

The Huether court found it was impermissible for Officer Michels to focus his search on the bag which, due to its weight and size, could obviously not have held a bottle or can.[84] In so doing, the court tacitly applied to a consent search the same probable cause requirement necessary for obtaining a warrant.[85] The court found support for this application in *United States v. Ross*,[86] which applied the same scope to a warrantless search based on probable cause as is applied to a search executed under a warrant based on probable cause.[87] Acknowledging that *Ross* involved a warrantless search conducted pursuant to probable cause rather than consent, the court supported its decision to apply the *Ross* rule to consent searches by stating that "[t]he rule articulated in *Ross* has also been applied to consent searches."[88]

In taking this like-kind approach, the court recognized the

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to search paper bag lying on the floor, because the general consent to search included the consent to search containers in the car that might contain drugs. *Id.* at __.

79. *Huether*, 453 N.W.2d at 782. Officer Michels stated at the preliminary hearing, "I then asked Mr. Huether if I could check his vehicle, search for open containers, and he said, yes, I could." Suppression Hearing Transcript, *supra* note 1, at 36.

80. *Huether*, 453 N.W.2d at 782.

81. *Id.*

82. *Id.* at 783.

83. *Id.* at 782. The court noted that the officer overlooked a larger paper bag containing an unopened six-pack and instead focused his search on a much smaller bag tucked under the front seat. *Id.*

84. *Id.* "The scope of a warrantless search based on probable cause is no more narrow—and no broader—than the scope of a search authorized by a warrant supported by probable cause." United States v. Ross, 456 U.S. 798, 823 (1982).

85. *Huether* 453 N.W.2d at 782.

86. 456 U.S. 798 (1982).

87. *Huether*, 453 N.W.2d at 782.

88. *Id.* (citing United States v. Kapperman, 764 F.2d 786, 794-95 (11th Cir. 1985) (concluding that officers did not exceed consent to search vehicle for narcotics when they opened trunk and searched an unlocked suitcase found therein, because officers could reasonably assume that narcotics could be found there)). *See also* United States v. White, 706 F.2d 806, 808 (7th Cir. 1983) (even if officer's intent was to find money, consent to search for narcotics allowed search of flight bag, because narcotics could reasonably be expected to be found therein).

consent search as stemming not from the basis of a constitutional waiver but, instead, from the same basis as a probable cause search: that police are only prohibited from making unreasonable searches.[89] Within this view, it is enough that the state show consent was voluntary, not that the consenting party knew it could withhold consent.[90]

The Huether court also considered the issue of whether Officer Michels had probable cause to believe the paper bag concealed an alcoholic beverage container.[91] Although vehicles may be subject to a warrantless search even without exigent circumstances, police must have probable cause for such a search.[92] The constitutional standard upon which probable cause is based is commonly stated as "reasonable grounds to believe" that a search will yield evidence of a criminal act.[93] It is generally accepted that the requirements of reliability and particularity upon which an officer may act in a warrantless search are no less stringent than when a warrant is obtained.[94] If this were not the case, officers would be encouraged to forego procurement of a warrant.[95] The mere observation that a person possesses a type of bag or container in which narcotics have often been concealed does not, by itself, give rise to probable cause.[96] However, when accompanied by what objectively appear to be furtive gestures, such observations may

89. *Huether*, 453 N.W.2d at 782. *Cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 232 (1973) (if viewed as a waiver, there is doubt whether consent searches may be used, except where the prosecution could show that the subject of the search was aware of his right to refuse, because a waiver requires an intentional relinquishment or abandonment of a known right or privilege).

90. *Schneckloth*, 412 U.S. at 232-34.

91. *Huether*, 453 N.W.2d at 782.

92. Carroll v. United States, 267 U.S. 132 (1927) (prohibition agents were held to have probable cause to search an automobile for illegal liquor upon recognition that vehicle may be quickly removed from jurisdiction). *See* California v. Acevedo, No. 89-1690 (Supreme Court of the United States, May 30, 1991) (LEXIS, Genfed library, courts file) (construing *Carroll* to provide one rule regarding search of containers within automobiles: Police, in a search extending only to a container within an automobile, may search the container without a warrant where they have probable cause to believe that it holds contraband or evidence). *See also* Chambers v. Maroney, 399 U.S. 42, 51-52 (1970) (post-arrest warrantless search of a vehicle yielded evidence that was admissible because there was no constitutional difference between the immediate warrantless search of a car and the holding of a car until a warrant was obtained).

93. Wong Sun v. United States, 371 U.S. 471, 479 (1963) (the totality of information which constitutes probable cause—evidence warranting the reasonable man to believe a crime has been committed—must be measured by the facts).

94. *Id.*

95. *Id.* at 479-80. The Court cautioned that a "relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice.' " *Id.* at 479 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

96. People v. Young, 89 Mich. App. 753, 755, 282 N.W.2d 211, 213 (1979) (although defendant dropped a tin foil packet, probable cause was lacking because criminal activity cannot be inferred from mere possession of such a common material).

properly substantiate probable cause.[97]

In *Huether*, the State argued that Officer Michels had probable cause to believe the bag might conceal an open container.[98] However, the court determined that the State's probable cause argument failed, just as its consent argument failed, because the trial court found that the bag could not reasonably be expected to conceal an open container.[99]

The court viewed the issue of whether the officer had probable cause as one requiring resolution of a factual conflict of testimonies.[100] Deferring to the trial court's superior position to judge the credibility of the testimony,[101] the court reasoned that the issue necessarily required resolution in favor of affirming the trial court decision.[102]

Had the court accepted that probable cause existed, based on its recognition that Officer Michels' belief that the bag could conceal an open alcoholic beverage container was reasonable, it would have validated search of the bag.[103] Such a validation would allow traffic enforcement to be used as a device for search of vehicles on the mere speculation that they contain contraband and would have laid a foundation upon which law-abiding North Dakotans could be subjected to capricious, exploratory searches.[104]

Prior to *Huether*, the question in North Dakota of privacy in

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97. Price v. United States, 429 A.2d 514, 517 (D.C. 1981) (probable cause existed where defendant, in possession of manila envelope commonly used in drug sales, made attempt to conceal envelope). *But see* People v. Superior Court, 3 Cal. 3d. 807, 822, 478 P.2d 449, 457-61, 91 Cal. Rptr. 729, 737- 41 (1970) (the potential for misunderstanding gestures of vehicle occupant suggests inferences should not be drawn; e.g., a driver's immediate exit from a stopped vehicle may be motivated by a desire to appear cooperative).

98. State v. Huether, 453 N.W.2d 778, 783 (N.D. 1990). Officer Michels testified that Huether immediately exited his car when the stop took place. Suppression Hearing Transcripts, *supra* note 1, at 9-12.

99. *Huether*, 453 N.W.2d at 783. *See also* United States v. Ross, 456 U.S. 798, 824 (1990) (the scope of a warrantless search is defined by the object of the search and places where there is probable cause to believe it exists); State v. Schinzing, 342 N.W.2d 105, 109-10 (Minn. 1983) (officer searching vehicle for open containers could not reasonably be expected to find the object of his search in an ashtray).

100. *Huether*, 453 N.W.2d at 783.

101. *Id.* *See* State v. Pickar, 453 N.W.2d 783, 785 (N.D. 1990) (North Dakota Supreme Court will reverse only if the trial court's decision is contrary to the weight of evidence).

102. *Huether*, 453 N.W.2d at 783. *See* State v. Lorenzen, 401 N.W.2d 508 (N.D. 1987) (Lorenzen's conviction of driving while under the influence of alcohol was affirmed because conflicts of testimony were resolved in favor of the trial court's finding).

103. Memorandum Opinion, *supra* note 8, at 4 (asserting that the search, even if based on probable cause, would be restricted to the limited purpose of determining whether an open receptacle containing an alcoholic beverage was concealed).

104. 2 W. LAFAVE, SEARCH & SEIZURE § 3.6(d) at 61-62 (2d ed. 1987) (conclusions drawn hastily from ambiguous gestures allow a traffic officer to search a vehicle on the hunch that it might contain contraband). *See also* State v. Lothenbach, 296 N.W.2d 854, 858 (Minn. 1980) (driver's and passenger's nervous demeanor, after being informed that they were being investigated for drug sales, was not sufficient basis for probable cause, because their anxiety stemmed, in large part, from the investigation).

the fourth amendment context was blurred, in the wake of *Rakas* and *Salvucci*, by uncertainty about the role of proprietary and possessory interests in determining when one's rights have been violated.[105] The court's affirmation of Huether's legitimate expectation of privacy in the searched bag, despite his post-search renunciation of ownership, establishes a guide to limit exploratory searches in North Dakota.[106] Recognition by courts of a bright line distinction between denial of ownership and abandonment, together with defendants becoming aware of the availability of a well-defined expectation of privacy rule, may result in more successful motions to suppress evidence obtained by conjectural searches.

However, expression by the court that a passenger's nonproprietary status outweighs his or her expectation of freedom from governmental intrusion[107] marks a rejection of the privacy doctrine developed in *Katz* and *Rakas*.[108] The *Rakas* majority emphasized that their holding did not stand for the proposition that a passenger who is lawfully present in a vehicle, but who has no possessory interest in it, lacks standing to challenge a search of that vehicle.[109] Yet, some courts have so interpreted *Rakas*.[110] Such an interpretation may reduce protection of legitimate expec-

105. State v. Klodt, 298 N.W.2d 783, 786 (N.D. 1980) (conferring "threshold standing" based either on ownership or legitimate expectation of privacy in vehicle, or both). *See also* Appellant's Brief 5-6, State v. Benjamin, 417 N.W.2d 838 (N.D. 1988) (No. 870040) (there is no new, clearly enunciated rule on standing since State v. Lind, 322 N.W.2d 826 (N.D. 1982), made *Salvucci* applicable to North Dakota). *See also* United States v. Salvucci, 448 U.S. 83, 95 (1980) (overruling the automatic standing rule by holding that defendants charged with crimes of possession may not automatically, by mere possession of articles seized, challenge a search but instead may only benefit from the exclusionary rule if their own fourth amendment rights have been violated). *See also* State v. Lind, 322 N.W.2d 826, 833 (N.D. 1982) (although the defendant in *Lind* was not charged with a possessory crime, the North Dakota Supreme Court reasoned that the charged crime of conspiracy, being based on the overt act of possessing a controlled substance, was sufficiently analogous to a possessory crime for *Salvucci* to apply).

106. State v. Huether, 453 N.W.2d 778, 781 (N.D. 1990) (expressing certainty that defendant had an expectation of privacy in his car and in every container therein that concealed its contents from plain view).

107. *Id.* at n.2 (stating that Veatch, because he was a passenger in a vehicle, did not have any reasonable expectation of privacy in the vehicle).

108. United States v. Katz, 389 U.S. 347, 352 (1967) (expressly recognizing protection for passengers of taxicabs). *See also* Rakas v. Illinois, 439 U.S. 128, 143 (1978) (relying on the holding in *Katz* "that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place").

109. *Rakas*, 439 U.S. at 149 n.17. *But see id.* at 156-58, 165, 167 (White, J., dissenting) (criticizing majority for specifically holding that a legitimate occupant of an automobile may not challenge a search of that vehicle if he does not own or have a possessory interest in it).

110. *See* United States v. Durant, 730 F.2d 1180, 1183 (8th Cir. 1984) (a mere passenger in an automobile does not ordinarily have the legitimate expectation of privacy necessary to challenge a proper search of that automobile). *See also* State v. Cowen, 104 Idaho 649, __, 662 P.2d 230, 231-32 (1983) (interpreting *Rakas* as a bar to passengers questioning the stopping of a car); State v. Ribera, 183 Mont. 1, __, 597 P.2d 1164, 1169

tations of privacy and again permit property interests to dominate fourth amendment rights.

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(1979) (stating that, according to *Rakas*, passenger has no standing to challenge search of automobile).